

Office of Chief Counsel  
Internal Revenue Service  
**memorandum**

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from: Susan L. Hartford  
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subject: Disallowance of Credit for Federal Income Tax Withholding When SSN/ITIN  
Mismatch Occurs

This Chief Counsel Advice responds to your request for assistance dated November 2, 2009. This advice may not be used or cited as precedent.

Federal law requires individuals with U.S. income, regardless of immigration status, to pay U.S. taxes. Section 6109 of the Internal Revenue Code provides that if a person is required to file a return, statement, or other document with the IRS, the person must include an identifying number. In general, an individual required to furnish a taxpayer identifying number must use a social security number (SSN). IRC § 6109(d). *See also* Treas. Reg. § 301.6109-1(a)(1)(ii)(A).

A person who has a filing obligation but is ineligible for a social security number may apply for and receive an individual taxpayer identification number (ITIN) from the IRS. Treas. Reg. § 301.6109-1(a)(1)(ii)(B). An ITIN is "a taxpayer identifying number issued to an alien individual by the Internal Revenue Service, upon application, for use in connection with filing requirements under this title. . . . For purposes of this section, the term *alien individual* means an individual who is not a citizen or national of the United States." Treas. Reg. § 301.6109-1(d)(3)(i).

An undocumented worker is not eligible to obtain an SSN. To fulfill his or her filing obligation, the undocumented worker must apply for an ITIN. The IRS's issuance of an ITIN to a taxpayer does not change that taxpayer's work status, and the ITIN cannot be used for employment purposes.

Section 3402 provides that every employer making a payment of wages must deduct and withhold income taxes from wages (commonly referred to as federal income tax withholding). When filing any returns and statements with the IRS, the employer is required to identify each employee by the employee's SSN. Treas. Reg. § 31.6011(b)-2(c)(1). Thus, in order to obtain work, an individual must provide an SSN to the employer which the employer can then use when reporting the amount of federal income tax withheld from the individual's wages.

When an employer withholds federal income tax pursuant to section 3402, the amount withheld is allowed to the recipient of the income as a credit against any income tax due to the IRS. IRC § 31. The term "recipient" for purposes of receiving credit for federal income tax withholding is defined as "the person subject to tax imposed under subtitle A upon the wages from which the tax was withheld." Treas. Reg. § 1.31-1(a).

You have asked for advice on whether the IRS is entitled to disallow the section 31 credit for federal income tax withheld in the following situation:

The taxpayer is an undocumented worker, not eligible for an SSN; however, the taxpayer provides someone else's SSN in order to obtain employment. The taxpayer receives wages from his employer, and the employer withholds federal income tax under that SSN. The taxpayer wishes to fulfill his tax return filing and payment responsibilities, so he obtains an ITIN and files a tax return using the ITIN. The W-2, however, attached to the return, contains the SSN the taxpayer provided his employer. The IRS processes the return under the ITIN, even though it is accompanied by a W-2 containing an SSN. During an audit of the return, the mismatch between the SSN and ITIN causes the IRS to disallow the federal income tax withholding credit the taxpayer claimed on his return until the IRS can determine if the taxpayer truly earned the wages for which the withholding credit is being claimed.

When the IRS disallows the federal income tax withholding credit for a taxpayer using an ITIN, the IRS is not saying that ITIN holders are not entitled to the credit as a matter of law; rather, the IRS is saying that it does not have sufficient information in its records to determine if the ITIN holder is the "recipient" within the meaning of section 31. The IRS explains the disallowance as follows: "The Federal Income Tax Withheld reported on your Federal Tax Return has been disallowed because we do not have a record that this tax was paid or reported on your behalf by your employer." IRM 4.19.15.38. The IRS is not precluded by the Code or the Treasury Regulations from ascertaining that the ITIN holder truly earned the wages for which the withholding credit is being claimed before allowing the claimed withholding credit.

The procedures the IRS uses to ascertain whether the ITIN holder is entitled to the credit instruct IRS employees to research the claimed withholding as follows:

Research Integrated Data Retrieval System (IDRS) using Command Code IRPTL to verify if the employer reported the wages and withholding per the Reporting Requirements for Employers. If there is no record of any withholding shown for the ITIN, do not allow the Federal Income Tax withholding. If the taxpayer used an invalid SSN and the withholding for your taxpayer has been reported under the invalid SSN, and no other taxpayer has filed under the SSN, allow the withholding as reported by the employer. See IRM 4.19.14.38.5 for Mixed Entity procedures.

IRM 4.19.15.38.4(2). The Mixed Entity procedures then provide as follows: “[I]f the taxpayer provides Form W-2’s, Form 1099’s, and other income supporting documents, and the forms are all under the assigned ITIN for this taxpayer, allow the information even if there are no records on IRPTL. **This does not apply to Federal Income Tax Withholding, which must be verified as reported and paid to the U.S. Treasury.**” (emphasis added). IRM 4.19.15.38.5(1)(a).

We believe the IRM needs clarification in several respects and suggest that you pursue revisions to the IRM. First, IRM 4.19.15.38.4(2) is misleading in that it implies that an ITIN holder is only entitled to the section 31 credit if no other taxpayer has filed a return using the SSN provided by the ITIN holder to his/her employer. In a situation where the ITIN holder’s W-2 (or Form 1099) reflects income tax withheld, and the only IRS records under the SSN used on the W-2 (or Form 1099) reflect that same amount of withholding, the IRM should indicate that there is no need for any further inquiry before allowing the withholding. The wording of the IRM further suggests that a taxpayer filing a return with an ITIN but claiming withholding tied to an SSN will get the credit so long as the ITIN holder files a return before the true owner of the SSN. Also, IRM 4.19.15.38.5(1)(a) suggests that Form W-2’s, Form 1099’s, and other income supporting documents will contain an ITIN. Employers are not allowed to use ITINs when filing returns, statements, and other documents with the IRS. See Treas. Reg. § 31.6109-1(a). See also Circular E, Employer’s Tax Guide.

It is our understanding that the IRS will allow the credit if the taxpayer can verify withholding. In fact, in the taxpayers’ cases you asked us to review in connection with this request for a legal opinion, the IRS generally corresponded with the taxpayers to give the taxpayers an opportunity to provide documentation that they were the true “recipient” of the wages within the meaning of section 31. The act of asking for further documentation, e.g., another copy of Form W-2, paystubs, earnings statement, or a statement from the employer, from the ITIN holder is a precaution the IRS takes to ensure that the ITIN holder earned the wages from which the tax was withheld.<sup>1</sup> Thus, we would suggest that IRM 4.19.15.38.4(2) should be revised along the following lines:

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<sup>1</sup> For ITIN holders who electronically file their returns, the IRS does not have a paper copy in its records of the W-2 containing the SSN. Thus, the IRS may often ask the ITIN holder to produce a copy of the W-2. For ITIN holders who file paper returns, it is our understanding that the IRS may also ask the taxpayer for a copy of the W-2 even though the IRS already has a copy, because it may take longer to request the original return from files.

Research Integrated Data Retrieval System (IDRS) using Command Code IRPTL to verify if the employer reported the wages and withholding per the Reporting Requirements for Employers. If there is a record of the withholding shown for the ITIN, you should allow the Federal Income Tax withholding credit. If, however, there is no record of any withholding shown for the ITIN, do not allow the Federal Income Tax withholding credit without additional documentation from the taxpayer. If the taxpayer used an SSN that is invalid and the withholding for the taxpayer has been reported under the invalid SSN, once you are able to verify that the withholding belongs to the taxpayer, allow the withholding. You may need to refer to the Mixed Entity procedures in IRM 4.19.15.38.5 if the true owner of the SSN has already filed a return.

We would also suggest that IRM 4.19.15.38.5(1)(a) be revised to read something like this:

Even if there are no records on IRPTL, a taxpayer with an ITIN should be entitled to the Federal Income Tax withholding credit if the taxpayer provides documentation (e.g., Form W-2, Form 1099, a paystub, earnings statement, statement from employer) to verify the amount of federal income tax withheld.

In conclusion, tentative disallowance and requests for documentation of the credit for federal income tax withholding when an ITIN/SSN mismatch occurs is a business decision to be made by the IRS rather than a decision dictated by anything in sections 31 or 6109 of the Internal Revenue Code. While there may be a burden on ITIN holders to produce documentation in order to receive the credit, and some ITIN holders may choose not to respond to the IRS's correspondence, those consequences must be balanced with the risk to the IRS if the credit was automatically allowed without verification.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

In providing this advice, we coordinated with the IRC §§ 31 and 6109 experts in the Office of Chief Counsel, CC:TEGE:EOEG:ET2, and CC:PA:B01, respectively. In addition, we coordinated with CC:WI, as the ITIN Program is part of the Wage and Investment Division.

Please call \_\_\_\_\_ if you have any further questions.